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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 LISA EVELYN MUNDALL,

10 Plaintiff,

11 v.  
12

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.  
16

No. 2:16-CV-00307-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

17 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
18 No. 12, 13. Attorney Rosemary B. Schurman represents Lisa Evelyn Mundall  
19 (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the  
20 Commissioner of Social Security (Defendant). The parties have consented to  
21 proceed before a magistrate judge. ECF No. 4. After reviewing the administrative  
22 record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion  
23 for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;  
24 and **REMANDS** the matter to the Commissioner for additional proceedings  
25 pursuant to 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed an application for Disability Insurance Benefits (DIB) on  
28 January 11, 2013, Tr. 194, alleging disability since September 5, 2011, Tr. 166-

1 167, due to anxiety, depression, post-traumatic stress disorder (PTSD), chronic  
2 lumbar pain, and chronic S.I. pain. Tr. 198. The applications were denied initially  
3 and upon reconsideration. Tr. 107-109, 111-112. Administrative Law Judge  
4 (ALJ) Jesse K. Shumway held a hearing on March 10, 2015 and heard testimony  
5 from Plaintiff, vocational expert, Daniel McKinney, and medical expert, Anthony  
6 Francis, M.D. Tr. 40-82. The ALJ issued an unfavorable decision on March 27,  
7 2015. Tr. 13-29. The Appeals Council denied review on July 14, 2016. Tr. 1-7.  
8 The ALJ's March 27, 2015 decision became the final decision of the  
9 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
10 405(g). Plaintiff filed this action for judicial review on August 29, 2016. ECF No.  
11 1.

### 12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the  
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
15 here.

16 Plaintiff was 43 years old at the alleged date of onset. Tr. 175. Plaintiff  
17 completed a Bachelor of Arts degree in creative writing in 1990. Tr. 199, 281.  
18 Plaintiff worked as an attendant counselor caring for the developmentally disabled  
19 from 1990 through her alleged date of onset. Tr. 199, 281. Plaintiff reported that  
20 she was injured on September 5, 2011 and returned to work on October 26, 2011  
21 for only two hours before she was assaulted by a patient. Tr. 199, 282, 292. She  
22 reported that she stopped working due to her conditions. Tr. 198.

### 23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in  
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
26 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
27 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
28 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

1 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
2 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
3 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
4 another way, substantial evidence is such relevant evidence as a reasonable mind  
5 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
6 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
7 interpretation, the court may not substitute its judgment for that of the ALJ.  
8 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
9 findings, or if conflicting evidence supports a finding of either disability or non-  
10 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
11 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by  
12 substantial evidence will still be set aside if the proper legal standards were not  
13 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
14 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process  
17 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a), *see Bowen*  
18 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
19 proof rests upon the claimant to establish a prima facie case of entitlement to  
20 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the  
21 claimant establishes that physical or mental impairments prevent her from  
22 engaging in her previous occupations. 20 C.F.R. § 404.1520(a)(4). If the claimant  
23 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
25 other work, and (2) specific jobs exist in the national economy which the claimant  
26 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
27 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the  
28 national economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

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At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since September 5, 2011, the alleged onset date. Tr. 15.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 16.

she could not climb ladders, ropes, or scaffolds, could only frequently balance, could only occasionally perform all other postural activities; could only frequently use foot controls bilaterally; could have no concentrated exposure to extreme cold, vibration, and pulmonary irritants; could have no exposure to hazards, including unprotected heights and moving mechanical parts; could perform only simple, routine, repetitive tasks; and could have only superficial contact with co-workers, supervisors, and the public.

Tr. 18. Then from May 21, 2014 through the date of the decision, the ALJ found Plaintiff had a “slightly different,” residual functional capacity “reflecting improvement in her physical condition, but deterioration in her mental health.” *Id.* Specifically, the ALJ found she could perform a range of light work, with the nonexertional limitations from the above residual functional capacity plus “she could have no interaction with the public.” *Id.* The ALJ identified Plaintiff’s past relevant work as an orderly and concluded that Plaintiff was not able to perform this past relevant work. Tr. 26.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,  
2 work experience and residual functional capacity, and based on the testimony of  
3 the vocational expert, there were other jobs that exist in significant numbers in the  
4 national economy Plaintiff could perform from onset to May 21, 2014, including  
5 the jobs of clock assembler, hand bander, table work, and production assembler.  
6 Tr. 28. The ALJ then made a separate step five determination for May 21, 2014 to  
7 the date of the decision, finding Plaintiff could perform the jobs of production  
8 assembler and electronics worker. *Id.* The ALJ concluded Plaintiff was not under  
9 a disability within the meaning of the Social Security Act at any time from  
10 September 5, 2011, through the date of the ALJ's decision, March 27, 2015. *Id.*

## 11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's  
13 decision denying benefits and, if so, whether that decision is based on proper legal  
14 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider her  
15 testimony regarding her mental limitations and (2) failing to properly assess all the  
16 evidence when forming Plaintiff's residual functional capacity. ECF No. 12 at 2.

## 17 DISCUSSION

### 18 A. Plaintiff's Testimony

19 Plaintiff contests the ALJ's determination that her mental health symptom  
20 allegations were less than fully credible. ECF No. 12 at 5-11.

21 It is generally the province of the ALJ to make credibility determinations,  
22 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific  
23 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
24 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's  
25 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d  
26 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).  
27 "General findings are insufficient: rather the ALJ must identify what testimony is  
28 not credible and what evidence undermines the claimant's complaints." *Lester*, 81

1 F.3d at 834.

2 The ALJ found Plaintiff less than fully credible concerning the intensity,  
3 persistence, and limiting effects of her symptoms. Tr. 20. The ALJ reasoned that  
4 Plaintiff was less than fully credible concerning her alleged mental limitations  
5 because (1) the degree of limitation was not supported by the evidence of record,  
6 (2) she was able to speak and answer questions at the hearing, and (3) she was  
7 currently engaged in vocational rehabilitation. Tr. 25-26.

8 **1. Evidence of Record**

9 The ALJ found Plaintiff's testimony was less than fully credible, stating the  
10 alleged degree of limitation resulting from her mental impairments were not  
11 supported by the evidence of record. Tr. 25. First, the ALJ found that "there was  
12 evidence that claimant experienced some trouble with concentration in December  
13 2012," but testified that her impairments only began to increase after she had been  
14 out of work for a year. Tr. 25. Plaintiff testified that her symptoms developed  
15 after she stopped working, "during the next year or so." Tr. 64. Plaintiff's alleged  
16 date of onset was in September of 2011. From September of 2011 to December of  
17 2012 is about a "year or so." As such, Plaintiff's testimony was consistent with the  
18 record.

19 Next, the ALJ stated that "while the claimant continued to have nightmares  
20 and remained suspicious of vehicles traveling by her house, the record also  
21 indicates that the claimant had removed the covering from all her windows and  
22 was walking around her yard without the cover of tarps," citing to the record at 406  
23 through 408 and 556. Tr. 26.

24 At the March 10, 2015 hearing, Plaintiff testified that there was a plywood  
25 billboard with a tarp at the bottom blocking her porch from the view of a neighbor.  
26 Tr. 61-62. She testified that originally she had "tarps going all the way around my  
27 backyard." Tr. 62. She additionally testified that she "put some tarps up on my  
28 garden fence" in order to do some gardening. Tr. 63. She acknowledged that her

1   psychologist had helped her, stating “[s]he got me back outside, so. I mean, it  
2   terrifies me but it’s my favorite place to be, so.” Tr. 68.

3           The records the ALJ cited show that on March 19, 2013, Plaintiff reported  
4   improvement in her mental health with new medications. Tr. 406. On January 7,  
5   2015, Deborah S. Baldwin, Ph.D. wrote, “[s]he is no longer covering all her  
6   windows, and maintaining tarps ou[t]side near her house in order to feel safe  
7   enough to go into her yard (she even got her yard raked up this year. . .).” Tr. 557.

8           Plaintiff’s testimony to originally having tarps around her entire property  
9   and only now having plywood and tarps around her porch and garden are  
10   consistent with the records cited by the ALJ. It shows that Plaintiff’s mental health  
11   symptoms improved resulting in fewer barriers around her property over time. The  
12   ALJ fails to state how Plaintiff’s testimony is undercut by the records she cites.  
13   The ALJ fails to demonstrate how some improvement, which was admitted by  
14   Plaintiff, was unsupported by the record and what bearing that had on Plaintiff’s  
15   credibility. As such, this claim that Plaintiff’s allegations are unsupported by the  
16   record is not specific, clear and convincing.

## 17           **2.     Actions at Hearing**

18           Likewise, the ALJ concluded that Plaintiff’s ability “to speak and answer  
19   questions directly and on point without hesitation at [the] hearing” was inconsistent  
20   with the degree of limitation she alleged. Tr. 25-26. An ALJ may rely on her  
21   observations made at a hearing. *Verduzco v. Apfel*, 188 F.3d 1087, 1090, (9th Cir.  
22   1999). However, the ALJ failed to state how the ability to speak and answer  
23   questions was inconsistent with Plaintiff’s alleged impairments. As such, this  
24   reason lacks the specificity required of *Lester* and is in error.

## 25           **3.     Vocational Rehabilitation**

26           The ALJ’s third reason for finding Plaintiff’s mental health symptom reports  
27   less than fully credible, that she was involved in vocational rehabilitations, is not  
28   legally sufficient.

1 The Ninth Circuit has held that the ability to attend vocational rehabilitation  
2 classes can support an adverse credibility finding when the rehabilitation  
3 “indicat[es] activities in excess of the residual functional capacity.” *See Marsh v.*  
4 *Colvin*, 792 F.3d 1170, 1173 n.2 (9th Cir. 2015). Here, Plaintiff testified that she  
5 was in the “plan development” stage of being retrained in an area where she could  
6 work from home. Tr. 69. Since Plaintiff was not yet engaged in work activities  
7 through the program, it is unclear if the rehabilitation resulted in activities in  
8 excess of the residual functional capacity. Therefore, this reason does not meet the  
9 specific, clear and convincing standard.

10 Considering the errors addressed above, this case is remanded for the ALJ to  
11 make a new credibility determination.

12 **B. Residual Functional Capacity**

13 Plaintiff challenges the ALJ’s residual functional capacity assessment  
14 arguing that the ALJ’s assessment is not supported by substantial evidence. ECF  
15 No. 12 at 11-18.

16 A claimant’s residual functional capacity is the “maximum degree to which  
17 the individual retains the capacity for sustained performance of the physical-mental  
18 requirements of jobs.” 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(c). In  
19 formulating a residual functional capacity, the ALJ weighs medical and other  
20 source opinions and also considers the claimant’s credibility and ability to perform  
21 daily activities. *See, e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226  
22 (9th Cir. 2009).

23 In this case, the ALJ found Plaintiff had the following residual functional  
24 capacity:

25  
26 she could not climb ladders, ropes, or scaffolds, could only frequently  
27 balance, could only occasionally perform all other postural activities;  
28 could only frequently use foot controls bilaterally; could have no  
concentrated exposure to extreme cold, vibration, and pulmonary



1 irritants; could have no exposure to hazards, including unprotected  
2 heights and moving mechanical parts; could perform only simple,  
3 routine, repetitive tasks; and could have only superficial contact with  
co-workers, supervisors, and the public.

4 Tr. 18. Then from May 21, 2014 through the date of the decision, the ALJ  
5 found Plaintiff had a “slightly different,” residual functional capacity “reflecting  
6 improvement in her physical condition, but deterioration in her mental health.” *Id.*  
7 Specifically, the ALJ found she could perform a range of light work, with the  
8 nonexertional limitations from the above residual functional capacity plus “she  
9 could have no interaction with the public.” *Id.*

10 Plaintiff asserts that substantial evidence does not support the ALJ’s  
11 conclusion that Plaintiff’s mental health deteriorated and her physical health  
12 improved on May 21, 2014. ECF No. 12 at 12. The record contains no treatment  
13 notes dated May 21, 2014. Also, there is no indication that any substantial change  
14 occurred for Plaintiff on May 21, 2014. The mental health treatment records  
15 acknowledged a worsening of mental health symptoms and an improvement in  
16 physical symptoms around that time, but nothing specific to May 21, 2014. At the  
17 end of April 2014, Dr. Baldwin observed that Plaintiff was able to walk without  
18 the assistance of a cane and again had erected tarps around her property for  
19 protection. Tr. 574. On May 13, 2014 Plaintiff again discussed her reliance on  
20 tarps shielding her as a precursor to going outside. Tr. 570. On May 20, 2014,  
21 Plaintiff reported that she was unable to spend any time outside without the  
22 protection provided by the tarps around her property. Tr. 570-571. However, by  
23 June 3, 2014, Plaintiff reported some improvement in mental health impairments,  
24 including being able to walk around her property without the cover of tarps. Tr.  
25 571.

26 While there may be evidence to support a shift in severity of Plaintiff’s  
27 mental and physical impairments in late April and May of 2014, the ALJ failed to  
28 point to any evidence that supported a finding that a substantial change occurred

1 specifically on May 21, 2014 and was sustained to the date of the decision. While  
2 an ALJ is allowed to make inferences as to a Plaintiff's onset date, there must be a  
3 basis for the date in medical evidence. S.S.R. 83-20.<sup>1</sup> Here there is no medical  
4 evidence to support the specific date. As such, substantial evidence does not  
5 support the ALJ's determination.

## 6 **REMEDY**

7 The decision whether to remand for further proceedings or reverse and  
8 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
9 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
10 where "no useful purpose would be served by further administrative proceedings,  
11 or where the record has been thoroughly developed," *Varney v. Secretary of Health*  
12 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
13 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280  
14 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
15 (noting that a district court may abuse its discretion not to remand for benefits  
16 when all of these conditions are met). This policy is based on the "need to  
17 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are  
18 outstanding issues that must be resolved before a determination can be made, and it  
19 is not clear from the record that the ALJ would be required to find a claimant  
20 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
21 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
22 F.3d 1172, 1179-80 (9th Cir. 2000).

23 In this case, it is not clear from the record that the ALJ would be required to  
24 find Plaintiff disabled if all the evidence were properly evaluated. Further  
25 proceedings are necessary for the ALJ to determine Plaintiff's credibility regarding  
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27 <sup>1</sup>While May 21, 2014 is not the onset date, it is the date the residual  
28 functional capacity changes, therefore it is analogous to an onset date.

1 her symptom reporting and to form a new residual functional capacity  
2 determination supported by substantial evidence. The ALJ will also need to  
3 supplement the record with any outstanding medical evidence and take testimony  
4 from a psychological expert and a vocational expert.

5 **CONCLUSION**

6 Accordingly, **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment, **ECF No. 13**, is  
8 **DENIED**.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is  
10 **GRANTED**, and the matter is **REMANDED** to the Commissioner for additional  
11 proceedings consistent with this Order.

12 3. Application for attorney fees may be filed by separate motion.

13 The District Court Executive is directed to file this Order and provide a copy  
14 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
15 **and the file shall be CLOSED.**

16 DATED August 23, 2017.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE